

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON DEMARCO HARDEN,

Defendant-Appellant.

UNPUBLISHED

June 15, 2006

No. 261156

Wayne Circuit Court

LC No. 04-010424-01

Before: Whitbeck C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for four counts of armed robbery, MCL 750.529, one count of carjacking, MCL 750.529a, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 18 years and nine months to 40 years' imprisonment for the armed robbery convictions, 15 to 30 years' imprisonment for the carjacking conviction, and two years' imprisonment for the felony-firearm conviction. Because defendant was not denied the effective assistance of counsel at trial, sufficient evidence existed for a rational trier of fact to find defendant guilty of armed robbery, and defendant was not denied a fair trial due to prosecutorial misconduct, we affirm.

This case arises out of a robbery of a store that occurred on July 4, 2004. On that day, at approximately 4:30 p.m., defendant and three other men entered the store after planning to commit a robbery. Defendant and the others ordered three store employees and a security guard named Stanley Roland around at gunpoint while they took cash from a the cash register, video games and DVDs from display cases, and a gun that was located near the register. After noticing a safe in the store, they ordered one of the victims to open it but he did not know the combination. In addition to taking store property, the robbers also took personal items from the victims including wallets, cell phones, and car keys. Ultimately, defendant and the others ordered the victims to the back of the store, told them to get on a mattress and stay on it for 20 seconds while defendant and his associates left the store. After the robbery, one of the victims' cars was gone.

Defendant first argues that he was denied his right to effective assistance of counsel at trial. A claim of ineffective assistance of counsel should be raised in a motion for a new trial or an evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Post-trial, defendant filed a motion with this Court to remand for an evidentiary hearing to develop the

record with respect to his ineffective assistance of counsel claim. This Court granted defendant's motion and the trial court held an evidentiary hearing. Therefore, this issue is properly preserved for our review. The trial court concluded that defendant did not meet the heavy burden of proving that his counsel was ineffective and also stated that, even if defense counsel had called the witnesses, the outcome of the trial would have been the same. We review the trial court's factual findings for clear error, while we review its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To prevail on a claim for ineffective assistance of counsel, a defendant must make two showings. First, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, the defendant was denied his Sixth Amendment right to counsel. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578. Second, the defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin*, *supra* at 599-600. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant specifically asserts that defense counsel was ineffective for not filing a notice of alibi defense. A review of the record reveals that defense counsel initially rejected the alibi defense as a matter of trial strategy, but at the beginning of trial moved to admit the alibi witnesses. By that point, however, the trial court denied defense counsel's motion because it was too late. Defense counsel admitted at the evidentiary hearing that he did not have a good explanation for not filing the notice ceding that even if he did not plan to use the defense, there was no harm in filing the notice. Even if we were to agree that counsel's performance was deficient under an objective standard of reasonableness, the inquiry does not end here.

To prevail on his claim, defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Carbin*, *supra* at 599-600. At trial, the prosecution presented three eyewitnesses who each identified defendant as one of the men who robbed the store. Another witness, Reginald Bell, testified that on the same day of the robbery, he was present with defendant when defendant and others decided to commit a robbery. Bell stated that he provided defendant with a car specifically for the purpose of robbing the store. After the robbery, defendant and the others met up with Bell and provided him with \$150, and DVDs and video games in exchange for arranging the transportation. Also at trial, Detective Ira Todd testified that after the police took defendant into custody, defendant indicated that he was a part of the robbery but that he did not use a gun.

Defendant's alibi witnesses were his girlfriend, Angela Harris, and his grandparents Lonnie and Alonzo Harden. Harris testified that she dropped defendant off at his grandparents' house on the day of the robbery, left, and returned around 5:00 or 5:30 p.m. Defendant's grandparents testified that defendant arrived at their house around 12:30 or 1:00 p.m. and did not leave until after 5:00 p.m. In reviewing the testimony at the *Ginther*¹ hearing, the testimony of the alibi witnesses is equivocal at best and allowed for timing gaps on the date in question. Clearly Harris's testimony shows that she was not even with defendant at the time of the robbery and cannot vouch for defendant's whereabouts on the afternoon in question. Being that Harris and defendant's grandparents are biased witnesses, and that Harris was not with defendant at the time of the robbery, defendant's alibi is weak. Because the evidence against defendant was exceptionally strong, defendant cannot demonstrate the existence of a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Defendant next argues that the prosecutor presented insufficient evidence to convict him of the armed robbery of the security guard, Stanley Roland. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo, in the light most favorable to the prosecutor, and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute. *People v Rodgers*, 248 Mich App 702, 707; 645 NW2d 294 (2001). The prosecutor need not show that the victim actually owned the property taken. Instead, the prosecutor need only show that the property was taken in the victim's "presence" and that the victim's right to possess the property was superior to that of the defendant's right to possess it. *Id.*

Defendant specifically argues that, because Roland did not lose any personal property as a result of the robbery, there is insufficient evidence to show that defendant committed an armed robbery regarding Roland. The essence of armed robbery, however, is not that the property belonged to the victim, but rather, that it belonged to someone other than the thief. *Rodgers*, *supra* at 711. The "appropriate 'unit of prosecution' for armed robbery is the person assaulted and robbed." *Id.* at 712, quoting *People v Wakeford*, 418 Mich 95, 112; 341 NW2d 68 (1983). Plainly, as the security guard employed solely to protect the store, its employees and merchandise, Roland had a right to the stolen property superior to that of defendant. Defendant and others pointed guns at Roland and forced him to the floor while they robbed the store. When viewing the evidence in a light most favorable to the prosecution, there is simply no other logical result than to conclude that the prosecution presented sufficient evidence to support a finding that defendant committed an armed robbery of Roland.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Finally, defendant argues that the prosecution made improper remarks that denigrated defense counsel and denied defendant a fair trial. A defendant preserves the issue of prosecutorial misconduct by making a timely, contemporaneous objection and request for a curative instruction. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Defendant failed to object to the prosecutor's remarks below and this issue is unpreserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Id.* The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. The defendant bears the burden of persuasion with respect to prejudice. *Id.* Once a defendant satisfies the three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*, at 763-764.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 434-435; 597 NW2d 843 (1999). Prosecutorial misconduct issues are examined case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context to determine whether defendant was denied a fair trial. *Id.*, at 434-435. A prosecutor cannot personally attack the defendant's attorney because this type of attack can infringe upon the defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996).

Defendant points out a number of the prosecutor's remarks during its closing argument as improper. Among those remarks are statements that "[defendant has] the right to have [defense counsel] stand up here for a half an hour and attempt to confuse you or throw some doubt into it. That's his job"; "[defense counsel] made a lot of very interesting . . . highly imaginative, highly speculative suggestions to you . . . that's just what it is, speculation. Poof! It's gone. There's nothing there"; and "I submit to you member[s] of the jury, what you're left with after you get through all of that, all the smoke and mirrors, and what if this, where is this person, start with two, end with one, all of that, and you just look at the evidence."

While one of the comments suggests that defense counsel's job is to confuse the jury, in context, the prosecution's remarks focus on defense counsel's arguments regarding possible police misconduct. The comments also urged the jury to look at the evidence rather than defense counsel's arguments. After examining the statements in context, we conclude that the prosecutor's remarks were not personal attacks infringing on defendant's rights. *Kennebrew*, *supra* at 607-608. And, after reviewing the record, we are certain that the jury convicted defendant based on the evidence. Even if the prosecutor's statements had constituted error, defendant could not show that the error affected the outcome of the lower court proceedings. *Carines*, *supra* at 763. Defendant was not denied a fair and impartial trial. *Rice*, *supra* at 434-435. Because the prosecution's remarks were proper and defense counsel is not required to make futile objections, defense counsel was not ineffective for declining to object to the prosecutor's

remarks. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Pat M. Donofrio